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February 19, 1999

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket Nos. 96-98 & 98-147

Dear Ms. Salas:


Pursuant to Section 1.1206 of the Commission's rules, the Competitive Telecommunications Association ("CompTel"), hereby gives notice that on February 18, 1999, Russell Frisby, Carol Ann Bischoff, Joseph Gillan, Robert Aamoth, and the undersigned met with Lawrence Strickling, Chief, Common Carrier Bureau, Carol Matthey, Michael Pryor and Donald Stockdale of the Common Carrier Bureau, to discuss CompTel's ex parte letter filed on February 12, 1999, in the above-referenced proceedings. A copy of CompTel's February 12 letter is attached.

KELLEY DRYE & WARREN LLP

Ms. Magalie R. Salas
February 19, 1999
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In accordance with Section 1.1206(b), an original and one copy of this notice is being provided.

Sincerely,



Steven A. Augustino

SAA:pab

Enclosures

cc: FCC staff listed above

DUPLICATE

February 12, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket Nos. 96-98 & 98-147

Dear Ms. Salas:

I have enclosed for the record in the above-referenced rulemaking proceedings two items regarding the Commission's remand proceedings from the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*. One item is a list of issues and questions on which the Commission should seek comment, and the other item is proposed standards for implementing the "necessary" and "impair" provisions in Section 251(d)(2).

Please address any inquiries to the undersigned.

Sincerely yours,



Carol Ann Bischoff
Executive Vice President and General Counsel

cc:

Lawrence Strickling
Thomas Power
Linda Kinney
Kevin Martin
Paul Gallant
Kyle Dixon
Christopher Wright
Carol Matthey
Robert Pepper

Donald Stockdale
Kathy Brown
Michelle Carey
Jake Jennings
Michael Pryor
Valerie Yates
Laurence Bourne
Claudia Fox



STANDARDS FOR ACCESS TO UNBUNDLED NETWORK ELEMENTS

The Supreme Court instructed the FCC “to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the ‘necessary’ and ‘impair’ requirements.”

When considering the “necessary” and “impair” requirements as required by Section 251(d)(2), the FCC should articulate standards which further the underlying purposes of Section 251(c)(3)’s unbundling requirement, and which will lower barriers to entry in all telecommunications markets. The Section 252(d)(2) factors should be considered, at a minimum, along with other potential factors when evaluating how the goals of the Act would be furthered by access to a network element. ILEC network elements are unique because they can be provisioned more efficiently, they can be combined with other ILEC elements electronically, and because they enjoy the advantages of the ILEC network’s size, scope and network topology.

Proposed interpretation:

251(d)(2)(A): Access to a network element that has a proprietary component is necessary if a material loss in the functionality of the network element would result without access to its proprietary aspect and if the requesting carrier’s ability to provide the intended service would otherwise be impaired in accordance with 251(d)(2)(B).

251(d)(2)(B): A carrier is impaired if a failure to obtain access to a network element would impose a material increase in cost, a material delay, or would materially restrict the number or scope of customers likely to receive the service any requesting carrier seeks to offer. Impairment would arise if, for example, any one of the following applied:

- a) a denial would materially increase the cost to provision, combine, or otherwise utilize a requested network element in connection with other elements of the ILEC’s network or the network of an alternative provider,
- b) a denial would cause a requesting carrier to experience a material delay to provision, combine or otherwise utilize a network in connection with other elements of the ILEC’s network or the network of an alternative provider,
- c) a network element exhibits material economies of scale and scope, or
- d) a network element is not available from multiple alternative sources, on terms that are comparable in quality, cost and efficiency to those of the ILEC, according to accepted commercial standards, and in quantities sufficient to result in a competitive market for such elements and facilities.



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**ISSUES TO BE CONSIDERED
IN RESPONSE TO AT&T v. Iowa Utilities Board**

1. UNE DEFINITIONAL ISSUES.

The Supreme Court's decision upheld the Commission's authority to define network elements in terms of the features, functions and capabilities of the ILEC network. "Given the breadth of [the 1996 Act's definition of "network element"], it is impossible to credit the incumbents' argument that a 'network element' must be part of the physical facilities and equipment used to provide local phone service." Slip Op. Part III, A.

- * What are the advantages of defining network elements according to their functionalities, rather than as specific facilities?
- * Will defining network elements as functionalities better promote the goals of the Act by enabling competitors to obtain capabilities of the network even as the network continues to evolve?
- * Is a functional definition of network elements more forward looking and better able to accommodate upgrades within an ILEC network?
- * Is a functional definition of network elements better able to accommodate uses of UNEs for both voice and data applications?
- * Given the broad nature of the statutory definition of a network element, should the FCC define elements with overlapping capabilities? Would such an approach lower barriers to entry using network element or make it easier for a competitor to exercise its statutory right to provide service solely using an ILECs' network elements?
- * A recent article in USTA's magazine TeleTimes noted that "[b]ecause of their fragmentary nature, UNEs will be operationally difficult to order and to provision by both sides. Product packages that comprise appropriate and pre-set UNE combinations could reduce some of the difficulties."¹ Should the Commission define pre-set packages as UNEs to further the procompetitive objectives of the Act?
- * If commenters oppose defining network elements with overlapping capabilities, how can this argument be reconciled with the Commission's treatment of both an unbundled loop and its sub-loop components as separate network elements?
- * What are the advantages of defining unbundled loops as an end to end transmission path of a specified bandwidth and transmission protocol?

¹ *Wholesale Marketing Strategy: A Changing Portfolio of Opportunities*, TeleTimes, Volume 12, No. 3, page 37.

- * Would a definition of an unbundled loop as an end to end transmission path of a specified bandwidth and transmission protocol enable loops to be provided when the physical facility is routed through an integrated digital loop carrier?
- * Should a requesting carrier be permitted to identify the origination and termination points of unbundled network elements, such as the loop? Would such an approach better enable new entrants to combine network elements efficiently?

2. EXISTING UNES DEFINED IN SECTION 51.319.

The Supreme Court faulted the FCC's premise in evaluating UNES, but did not fault any of the specific UNES defined in Section 51.319 of the Commission's rules.

- * Are requesting carriers ordering all of the UNES identified in Section 51.319? Does the fact that new entrants are ordering UNES indicate that the network elements are useful to new entrants?
- * Based upon carriers' experience since adoption of the rules, are the existing network element definitions sufficient to accommodate requesting carriers' needs for the provisioning of voice and data services?
- * How should the FCC refine its definitions of UNES to ensure that competitors are able to utilize the data capabilities of the ILEC networks most efficiently?
- * What additional UNES should the FCC define, now that it has more experience with the barriers to entry in local telecommunications markets, particularly barriers to broad-based competition?
- * Under the Commission's rules, states remain free to identify additional network elements that must be provided. Nothing in the Supreme Court's ruling undermines this approach to defining network elements. We seek comment on this tentative conclusion.

3. ACCESS TO AND USE OF NETWORK ELEMENTS.

- * In addition to defining network elements, should the Commission also define the means by which an ILEC must provide access for purposes of provisioning, combining or otherwise utilizing the network element?
- * How should the FCC define elements so that a requesting carrier is best able to integrate them with other facilities or other elements?
- * What are the advantages of non-collocation based methods of combining UNES? Should the FCC's definition of UNES require that the network elements be provided in such a way that they can be combined through means other than collocation?

- * If an ILEC agrees to combine the elements on behalf of an entrant at cost-based rates, should the Commission also require open access to ILEC networks to combine network elements? Should the entrant have a choice of ILEC-combined elements or open access?

4. SECTION 251(D)(2)'S "NECESSARY" AND "IMPAIR" STANDARDS.

The Supreme Court instructed the Commission "to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." Slip Op., Part III, B. Any limitations on the availability of network elements must be "rationally related to the goals of the Act." *Id.*

- * How do the "necessary" and "impair" standards further the goals of the Act by lowering barriers to entry in all telecommunications markets?
- * Would consideration of alternative facilities outside the ILECs' network be inconsistent with the Act's goal of promoting all three methods of entry? Is consideration of alternative facilities outside the ILECs' network inconsistent with a requesting carrier's statutory right to provide service solely using network elements?
- * Section 251(d)(2) states that the Commission shall "consider" these requirements in defining network elements. How should the FCC consider these factors? What weight should the Commission give to these factors?
- * Section 251(d)(2) identifies the "necessary" and "impair" standards as factors that "at a minimum" the Commission should consider. What other factors should the Commission also consider? How should the FCC balance or weigh each of the relevant factors?
- * What are the advantages of integration of network elements within the ILEC network?
- * What are the disadvantages of using external facilities to replicate features or capabilities of the ILEC network?
- * To what extent do difficulties in provisioning or combining external facilities with network elements act as a barrier to broad-based local competition?
- * Given that Section 252(i) permits any telecommunications carrier to obtain any individual interconnection, service or network element provided to any other carrier, doesn't it follow that the Commission's consideration of the Section 251(d)(2) factors cannot be carrier-specific? Should the Commission instead evaluate these factors given the abilities and options of a typical carrier, regardless of whether any individual carrier may have abilities not generally possessed by other carriers?